

FEDERAL ELECTION COMMISSION
 999 E Street, NW
 Washington, DC 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5260
 DATE COMPLAINT FILED: 4/22/02
 DATE OF NOTIFICATION: 4/29/02
 DATE OF ACTIVATION: 9/03/02

EXPIRATION OF STATUTE OF LIMITATIONS:
 12/18/05

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 FEDERAL ELECTION
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 2002 DEC 20 A 11:51

COMPLAINANT:

Michael S. Kelley

RESPONDENTS:

Jim Talent
 Talent for Senate Committee and
 Garrett M. Lott, Treasurer
 Missouri Renewal Political Action Committee and
 John McKenzie, Treasurer
 Jennifer Woodbury
 Richard Chrismer
 Missouri Republican State Committee- Federal
 Committee and Harvey M. Tettlebaum, Treasurer
 Washington University of St. Louis
 Arent Fox Kintner Plotkin and Kahn, PLLC
 Missouri Hospital Association
 National Federation of Independent Businesses
 Midwest Manufacturing Technology Corporation
 Unigroup, Inc.
 Logan College of Chiropractics, Inc.
 HBE Corporation
 Interlift, Inc.
 May Department Stores International, Inc.
 Sioux City Truck and Trailer, Inc.
 Shaughnessy-Knief-Hawe Paper Company
 Bryan Printing Company
 Sandhill Quilting Co., Inc.
 Western Press, Inc.
 Fry Investment Company
 A.J. Brown, Inc.
 Abilheira & Ferrare, P.C.
 A-Mrazek Moving Systems, Inc.
 Tubular Steel Industries, Inc.

23-404-40-22

TMP Worldwide, Inc.
Hunter Engineering Company
Shilli Corporation
GFI Digital, Inc.
Gary Schell
Robert J. Human

RELEVANT STATUTES:

2 U.S.C. § 431
2 U.S.C. § 434
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)
11 C.F.R. § 100.7(a)(1)(iii)
11 C.F.R. § 100.7(b)(1)
11 C.F.R. § 100.8(b)(1)
11 C.F.R. § 110.1(g)(2), (3)
11 C.F.R. § 113(g)(6)(iii)

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

None

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I. GENERATION OF MATTER

This matter originated with a complaint filed by Michael S. Kelley on April 22, 2002.

The complaint alleges that former Missouri Congressman Jim Talent ran a covert Senate campaign prior to declaring his candidacy in October 2001 in violation of the source restrictions, contribution limits and disclosure requirements of the Federal Election Campaign Act of 1971, as amended ("the Act"). The specific allegations contained in the complaint are that Talent (1) accepted compensation from non-bona fide employment to unlawfully subsidize his costs of living while he tested the waters and later pursued his candidacy for U.S. Senate, and (2) used a state leadership PAC to test the waters and pursue his candidacy for U.S. Senate without conforming to the Act's source restrictions, contribution limits and disclosure requirements.

On November 5, 2002, Talent won the Missouri Senate race with fifty percent (50%) of the vote in the General Election against Democratic incumbent Jean Carnahan.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

1. Talent Loses the Missouri Gubernatorial Race in 2000 and Becomes Honorary Chairman of Missouri Renewal, a State Leadership PAC

Jim Talent is a former minority leader in the Missouri House of Representatives and four-term member of the U.S. House of Representatives (1992-2000). In 2000, he gave up his House seat to run for governor of Missouri. He lost the race by a narrow margin to Democrat Bob Holden.

On January 4, 2001, one day after Talent left the House, Missouri Renewal Political Action Committee ("Missouri Renewal") was organized under the Missouri Campaign Finance Disclosure Law, Chapter 130, RSMO 2000. Missouri Renewal is listed as a "continuing

committee," which under state law means a committee of continuing existence whose primary or incidental purpose is to receive contributions and make expenditures to influence, or attempt to influence, the actions of voters. *See* Mo. Rev. Stat. § 130.011(10) (2000). Notably, continuing committees may not be formed, controlled or directed by a candidate for public office and are, instead, usually organized or sponsored by businesses, labor organizations, and professional associations. *See id.* Talent served as Missouri Renewal's Honorary Chairman from January 4, 2001 until July 31, 2001.

Missouri Renewal's disclosure statements filed with the Missouri Ethics Commission do not provide a clear picture of Missouri Renewal's activities. The statements indicate that Missouri Renewal accepted contributions and made expenditures for fundraising activities in 2001 but provide only general descriptions of Missouri Renewal's activities, none of which directly link Missouri Renewal to a federal campaign.

The complaint alleges that Missouri Renewal was formed and controlled by Talent as a vehicle to illegally subsidize his exploratory efforts and campaign for U.S. Senate. In support thereof, the complaint alleges numerous facts to establish a connection between Missouri Renewal and Talent, including the following: (1) Talent's signature appears on Missouri Renewal's first state disclosure report, (2) Talent for Senate and Missouri Renewal use the same fundraisers, (3) contributors to Missouri Renewal also later contributed to Talent for Senate Committee, (4) Talent had control over his Talent for Governor Committee, (5) the media reported that \$40,000 donated to Missouri Renewal by the Missouri Republican Party was, at least in part, a reimbursement to Talent's gubernatorial campaign, (6) Talent for Senate occupies the office suite previously occupied by Missouri Renewal, (7) certain individuals who served as

1 officers of Missouri Renewal later joined the staff of Talent for Senate Committee, and (8) an
2 amendment filed by Missouri Renewal in April 2002 to its quarterly state disclosure report filed
3 in April 2001 deletes ten itemized expenditures that were apparently also reported as
4 expenditures by Talent for Governor Committee.¹ The Complaint also cites reports in the media
5 as early as January 1, 2001 that Talent was not ruling out another bid for public office, including
6 the Senate seat held by Senator Carnahan.

7 In its response, Missouri Renewal denies that it was established, financed, maintained and
8 controlled by Talent and further denies that it was a vehicle to promote Talent's candidacy for
9 any office. Missouri Renewal asserts that its Statement of Organization was filed by John
10 McKenzie, as Treasurer, that its original three directors did not include Talent, and that its
11 purpose is, and always has been, to support Republican candidates and causes advancing values
12 of faith, family, work and charity through party-building activities within the State. According to
13 Missouri Renewal, the appearance of Talent's signature on its first disclosure report above the
14 line for "candidate's signature" was a mistake. Missouri Renewal claims that a staff member
15 mistakenly used a pre-signed form left over from Talent's gubernatorial race.

16 Missouri Renewal further claims that it did not make any contributions to Talent's Senate
17 campaign. According to Missouri Renewal, Talent for Senate purchased at fair market value the
18 campaign software formerly used by Missouri Renewal. Moreover, Missouri Renewal moved

¹ The deleted expenditures may raise the question of whether Missouri Renewal made unlawful expenditures on behalf of the Talent for Governor Committee. This issue is a matter of state law and within the jurisdiction of the Missouri Ethics Commission. Consequently, this Office will not address the issue in this Report.

1 out of its offices on August 1, 2001 and never shared office space with either Talent for
2 Governor or Talent for Senate Exploratory Committee. Missouri Renewal acknowledges that it
3 paid "some expenses" incurred by Talent at the Lincoln Day festival in early 2001,² but states
4 that it did so in furtherance of party building, not in support of any campaign or potential
5 campaign by Talent.

6 Talent similarly downplays his involvement with Missouri Renewal. In addition, Talent
7 maintains that there is no evidence alleged in the complaint, and none exists, that could link
8 Missouri Renewal to federal campaign activity. He points out that Talent for Senate did not
9 accept any contributions from Missouri Renewal, specifically noting that Talent for Senate paid
10 fair market value for all assets transferred from Missouri Renewal, staff who switched did so at
11 appropriate time, and Talent's Senate campaign assumed the rent and utilities of the office suite
12 formerly used by Missouri Renewal as soon as he announced his potential Senate candidacy. He
13 further points out that it is not a violation of federal law for federal officeholders and candidates
14 to be associated with a nonfederal committee, or leadership PAC.

15 Nevertheless, there appears to be no dispute that Talent was associated with Missouri
16 Renewal in some capacity and that Missouri Renewal was created, at least in part, to advance
17 Republican candidates and causes in the State of Missouri.

² Neither the Complaint nor Missouri Renewal discloses the date(s) Lincoln Day festival took place; however, Missouri Renewal reported expenditures for Lincoln Day to the Missouri Ethics Commission in its quarterly report filed in April 2001, which covered activity between January 4, 2001 and March 31, 2001.

2. *Talent Accepts a Fellowship at Washington University*

On December 18, 2000, Talent accepted a two-year appointment as a Robert S. Brookings Fellow at Washington University in St. Louis, Missouri ("Washington University" or "University"). According to the response filed by Washington University, the terms of the fellowship were as follows: Talent became an unsalaried Adjunct Professor of Law beginning in the 2001 academic year, which was a joint appointment through the College of Arts & Sciences, Law School and Business School. Talent received credit for which is a part-time designation, and compensation in the amount of for the first year plus a discretionary budget of to support his educational and research activities at the University.

During the 2001 academic year, Talent taught two undergraduate classes on the inner workings of Congress. In Spring 2002, Talent co-taught a class on congressional ethics at the law school with his wife, an Adjunct Professor Law at the University for many years. In return, Talent reportedly received in Fiscal Year 2001 and in Fiscal Year 2002.

The complaint alleges that Talent and the University entered into this arrangement to subsidize Talent's Senate campaign by providing funds to support his costs of living while he pursued a Senate seat. In support thereof, the complaint maintains that Talent's compensation was out-of-line and not the result of bona fide employment. It points to the fact that Talent taught one class per semester and received approximately thirty-four percent (34%) more compensation than full-time associate professors at the University. The complaint further asserts that Talent holds neither a doctorate nor a masters degree and has no reputation or standing in the academic community.

Washington University makes three arguments in response to the allegations in the complaint, namely that (1) Talent's position at the University constituted bona fide employment, (2) its hiring of Talent was not unusual, and that (3) the compensation paid was not excessive or out-of-line. In support of its first argument, the University submits an affidavit in which the University's Chancellor attests that the fellowship granted to Talent was established to support the presence of distinguished visitors involved in the educational and scholarly programs at the University. The University also submits affidavits signed by three of its deans in which the deans attest that Talent taught three classes between January 2001 and May 2002 for the law school, business school and political science department, that Talent's courses received favorable reviews from students, and that Talent almost never missed a class.

Second, to demonstrate that its hiring of Talent was not unusual, the University provides examples of similar hires made by other colleges and universities of high-profile politicians at comparable salaries. The University also provides examples of similar hires at its own institution.

Finally, the University disclosed that salaries for full professors in the three schools that paid part of Talent's fellowship in Spring 2002 were on average

By

comparison, the average salaries for associate professors were

By these numbers, it appears that Talent received the full professor rate of pay

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1 The University maintains that this level of compensation was not out-of-line, particularly given
2 that Talent's credentials are comparable to or exceed the credentials of most associate and full
3 professors at the University. In addition to being a distinguished public official on both state and
4 federal levels, the University notes that Talent has a law degree from the University of Chicago
5 and clerked for the Honorable Richard Posner of the U.S. Court of Appeals for the Seventh
6 Circuit.

7 It should further be noted that accompanying the University's response to the complaint is
8 an affidavit signed by the Chancellor of the University in which the Chancellor attests that he met
9 with Talent before offering the appointment and that his understanding, after discussion with
10 Talent, was that Talent would not be running for elective office before 2004, if at all.

11 In his Response, Talent echoes the arguments made by the University and further asserts
12 that the complaint offers no evidence that his teaching constituted federal campaign activity or
13 that the University intended to benefit his political career.

14 **3. *Talent Becomes a Partner of a Washington-based Law Firm***

15 On or about March 8, 2001, Talent joined Arent Fox Kintner Plotkin & Kahn, PLLC
16 ("Arent Fox" or "the firm"), a Washington-based law firm, as a part-time lawyer and lobbyist.
17 At or about the same time, Arent Fox hired Jennifer Woodbury, a former congressional staffer
18 and lawyer from McDermott, Will & Emery, to work with Talent. In a press release dated March
19 8, 2001, Arent Fox announced that the firm hired Talent and Woodbury to recruit new clients,
20 raise the firm's profile and provide strategic advise to clients on federal issues. For his services,
21 Arent Fox paid Talent for approximately ten months work in 2001.

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1 The complaint alleges that Talent and Arent Fox entered into this arrangement to
2 subsidize Talent's Senate campaign by helping him maintain his standard of living while laying
3 the groundwork for his Senate campaign. In support thereof, the complaint alleges the following
4 facts: (1) federal law prohibited Talent from lobbying Congress for a year, (2) Jennifer
5 Woodbury would soon become a deputy campaign manager for Talent's 2002 Senate campaign,
6 (3) Talent incorporated Talent for Senate in August 2001 while still employed by Arent Fox, (4)
7 Talent and Woodbury together registered as lobbyists for six entities which have supported
8 Republican causes and have endorsed or contributed to Talent for Senate, at least one of which
9 already had in-house lobbying staff, (5) these entities coordinated their hiring of Talent and
10 Woodbury because the lobbying registrations were filed on same day, and (6) Woodbury
11 attended a White House meeting in November 2001 regarding the Senate race in Missouri while
12 still employed by Arent Fox.³

13 Arent Fox and Talent claim that they shared a bona fide employment relationship that was
14 independent of Talent's eventual candidacy. First, they explain that Arent Fox hired Talent with
15 the expectation that his exceptional track record of legislative accomplishments and policy-
16 making expertise would generate new clients. They claim that this expectation was realized after
17 Talent recruited six clients to the firm. Second, they assert that Talent and Woodbury provided
18 bona fide legal services and strategic advice to firm clients. In support of this assertion, Arent
19 Fox submitted lobbying disclosure statements, which show Talent and/or Woodbury as the

³ Woodbury apparently resigned from Arent Fox immediately following this meeting at the White House. See Steve Kraske, *Part-time Jobs Paid Talent \$320,000; Democrats Wary; He Sees No Problem*, Kansas City Star, March 17, 2002, at A1.

1 registered lobbyists for the six clients recruited by Talent. Third, they assert that the continuation
2 of representation of the six clients after Talent left the firm shows how the hiring of Talent was a
3 sound, arms-length, business decision for the firm. Finally, Arent Fox claims that Talent's
4 compensation was not excessive but rather in accordance with the firm's regular business
5 practices governing compensation for lateral partners.

6 4. *After Other Potential Republican Contenders Decide Not to Run for*
7 *Senate in 2002, Talent Forms an Exploratory Committee*
8

9 As early as January 2001, the media reported speculation that Talent might run for U.S.
10 Senate in 2002. Other potential candidates identified in the media included Rep. Jo Ann
11 Emerson and Rep. Kenny Hulshof, both Republican members of the U.S. House of
12 Representatives from the State of Missouri.

13 On or about June 4, 2001, Emerson and Hulshof announced their decisions not to run for
14 Senate in 2002, both citing family-related considerations.⁴ At that time, at least two articles
15 reported that Talent had been waiting for Emerson and Hulshof to make their decisions before he
16 decided whether or not to run for Senate.⁵ One such article reported that Emerson disclosed to
17 the media that she had spoken with Talent two or three weeks before her announcement and
18 during that conversation Talent indicated that he "would perhaps" run for Senate if either she or
19 Hulshof were not interested.⁶ Conflicting reports soon followed regarding Talent's intentions.

⁴ See Karen Branch-Briosio, *Hulshof and Emerson Won't Take on Carnahan*, St. Louis Post-Dispatch, June 5, 2001, at A5.

⁵ See Branch-Briosio, *supra* note 4; John Mercurio, *Talent Scouts Out Race: Former House Member Expected to Take on Carnahan in Missouri*, Roll Call, June 7, 2001.

⁶ See Branch-Briosio, *supra* note 4.

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1 On June 4, 2001, Talent's spokesperson reportedly announced that Talent had not yet made a
2 decision, while *Roll Call* reported on June 7, 2001 that Talent privately told Republicans that "he
3 will run for Senate" in 2002.⁷

4 On July 9, 2001, Talent advised Missouri Renewal in writing that he intended to resign
5 from his position as Honorary Chairman effective July 31, 2001. *See* Exhibit 11 attached to
6 Response of Missouri Renewal PAC.

7 On August 2, 2001, Talent announced the formation of an exploratory committee, Talent
8 for Senate Exploratory Committee, with the intention of running for U.S. Senate. In his official
9 statement, Talent stated that based upon the encouragement he received during his travels around
10 the State, he was confident that support for his campaign would be forthcoming so that he could
11 formally announce his candidacy in the near future. On the same date, Talent filed a Statement
12 of Candidacy with FEC and registered Talent for Senate Exploratory Committee as his principal
13 campaign committee.

14 Notably, Missouri Renewal's reported expenditures dropped dramatically after Talent
15 announced his exploratory committee. According to its disclosure statements, Missouri
16 Renewal's expenditures dropped from approximately \$60,000 between January 4, 2001 and
17 August 2, 2001 to approximately \$3,000 between August 3, 2001 and December 31, 2001.
18 Between January 1, 2002 and June 30, 2002, Missouri Renewal expended just over \$1,000, the
19 bulk of which was apparently spent on legal fees in May 2002. Moreover, the disclosure

⁷ *See* American Political Network Hotline, *Senate Report '02 Missouri: Talent Matters*, June 5, 2001; Mercurio, *supra* note 5.

1 statements indicate that Missouri Renewal stopped accepting contributions after June 30, 2001,
2 one month before Talent announced his exploratory committee. As of June 30, 2002, exactly one
3 year later, Missouri Renewal's reported cash-on-hand was approximately \$36,000. This amount
4 apparently represents the remaining balance from contributions received before July 1, 2001.

5 Talent acknowledges that members of Missouri Renewal's staff joined his exploratory
6 committee, including Richard Chrismer who had incorporated Missouri Renewal and later
7 became the spokesperson for Talent's Senate campaign. Further, the address listed for the
8 committee is the same office suite in St. Louis formerly used by Missouri Renewal. In its
9 response, Missouri Renewal states that it occupied this space until August 1, 2001, at which time
10 it moved operations to the home of one of its directors.

11 5. *Talent Announces His Candidacy for U.S. Senate*
12

13 On October 9, 2001, Talent announced his candidacy for U.S. Senate and filed an
14 amendment with FEC changing the name of his exploratory committee to Talent for Senate
15 Committee. Presumably to focus his efforts on his Senate campaign, Talent resigned from Arent
16 Fox at the end of December 2001 and terminated his fellowship at Washington University at the
17 conclusion of the 2002 spring semester.

18 Similarly, Woodbury resigned from Arent Fox on November 20, 2001. The Complaint
19 alleges that, one day earlier, Woodbury represented Talent at a meeting held by the White House
20 to discuss the Senate race in Missouri. Neither Talent, Woodbury nor Arent Fox address this
21 allegation at all, and no evidence has been presented indicating whether or not Woodbury
22 received compensation from Arent Fox for her time at this meeting.

6. *Missouri Democrats Accuse Talent of Running a Covert Senate Campaign*

In the spring of 2002, the media reported accusations from Missouri Democrats that Talent began testing the waters for a possible Senate campaign immediately after he left the U.S. House of Representatives on January 3, 2001 and that he used Missouri Renewal and his arrangements with Washington University and Arent Fox to collect more contributions than was permissible for a federal candidate. Shortly thereafter, on April 22, 2002, Michael S. Kelley filed the complaint herein as well as a complaint filed with the Missouri Ethics Commission alleging violations of federal and state campaign finance law.⁸

The complaint herein alleges generally that Talent used Missouri Renewal to campaign for the U.S. Senate before he officially announced his potential candidacy on August 2, 2001; however, it provides no specific instances of federal campaign activity conducted by Missouri Renewal during this time period. Instead, the complaint relies largely upon the apparent connection between Talent and Missouri Renewal and the following information: (1) Missouri Renewal paid for Talent's trip to Lincoln Days sponsored by the Missouri Republican Party, (2) Missouri sold campaign software to Talent for Senate, and (3) reports in the media as early as January 2001 that Talent was not ruling out running for "something" in 2002.

⁸ On October 18, 2002, the Missouri Ethics Commission issued a ruling dismissing the complaint filed therein against Missouri Renewal and the portion of the complaint against Jim Talent concerning his role in Missouri Renewal. According to the two-page opinion, which has become a matter of public record, the Missouri Ethics Commission found that there was "insufficient evidence" to support the proposition that Talent was a "candidate" under state law at the time he was actively involved with Missouri Renewal and, therefore, insufficient evidence to support a ruling that Talent violated Missouri's prohibition against candidates controlling or directing state continuing committees. See Attachment 1 (Letter to Talent from Missouri Ethics Commission dated October 18, 2002). Notably, the Missouri Ethics Commission dismissed the allegations in the complaint regarding Talent's acceptance of compensation from Washington University and Arent Fox on federal preemption grounds, observing that the allegations fall within the purview of FECA and the exclusive jurisdiction of FEC. See *id.*

By contrast, Talent and Missouri Renewal claim that Missouri Renewal did not engage in any federal election activity nor expressly advocate the election of Talent to any federal office. They maintain that Missouri Renewal's activities are, and always have been, devoted to party-building activities, not the promotion of any one individual or candidate.

B. Legal Analysis

1. Third Party Compensation - Alleged Implicit Subsidies of Senate Campaign

Based upon a review of the allegations contained in the complaint, the attachments thereto, and the responses filed by the respondents, it does not appear that either Washington University or Arent Fox paid compensation to Talent for purposes of supporting or subsidizing his candidacy for U.S. Senate.

A. Applicable Law

The Act prohibits corporations from making contributions or expenditures in connection with any Federal election. *See* 2 U.S.C. § 441b(a). The Act further prohibits any candidate or political committee from knowingly accepting or receiving any contribution or expenditure from a corporation. *See id.* "Knowingly" does not require a showing that the candidate or committee accepted the contribution with knowledge of a violation of law; instead, it merely requires a party's knowledge of the facts rendering its conduct unlawful. *See FEC v. Dramesi*, 640 F. Supp. 985, 987 (D.N.J. 1986); *accord FEC v. Friends of Jane Harman*, 59 F. Supp.2d 1046, 1056 n.11 (C.D.Cal. 1999).

Partnerships, on the other hand, are permitted to make contributions and expenditures in connection with a Federal election subject to the limitations of \$1,000 per election to candidate committees and \$5,000 per year to PACs. *See* 2 U.S.C. § 441a(a). The Act prohibits any

1 candidate or political committee from knowingly accepting or receiving any contribution or
2 expenditure above these limits. *See* 2 U.S.C. § 441a(f). For purposes of contribution limits and
3 source prohibitions, a limited liability company is treated as a corporation if it has publicly traded
4 shares or if it has elected to be treated as a corporation with the Internal Revenue Service. *See* 11
5 C.F.R. § 110.1(g)(3). Otherwise, a limited liability company is treated as a partnership and may
6 make contributions or expenditures to political committees subject only to the contribution limits
7 applied to partnerships. *See* 11 C.F.R. § 110.1(g)(2).

8 "Contribution or expenditure" includes "any direct or indirect payment, distribution, loan,
9 advance, deposit, or gift of money, or any services, or anything of value." 2 U.S.C. § 441b(b)(2).
10 The term "anything of value" includes the provision of any goods or services without charge or at
11 a charge which is less than the usual or normal charge for such goods or services. *See* 11 C.F.R.
12 § 100.7(a)(1)(iii).

13 Compensation paid to a candidate by an employer constitutes a contribution unless such
14 payments are made irrespective of the candidacy. *See* 11 C.F.R. § 113.1(g)(6). To determine
15 whether compensation was made irrespective of the candidacy, the Commission will examine (1)
16 whether such payments resulted from bona fide employment that is independent of the
17 candidacy, (2) whether such payments were exclusively consideration for the services provided
18 by the candidate as part of his or her employment, and (3) whether such payments are
19 comparable to the amount of compensation that would be paid to similarly qualified persons for
20 the same work over the same period of time. *See* 11 C.F.R. § 113.1(g)(6)(iii). Compensation
21 that meets these requirements is not subject to the requirements of the Act.

B. Analysis

1. Fellowship at Washington University

Washington University is a non-profit corporation incorporated in the State of Missouri on February 22, 1853. As such, the University is subject to the prohibition against corporate contributions set forth in 2 U.S.C. § 441b(a). Nevertheless, it appears that the University provided compensation to Talent irrespective of the candidacy and, therefore, did not make a contribution to his Senate campaign. *See* 11 C.F.R. § 113.1(g)(6).

First, the information provided by the University in its response to the complaint indicates that the payments made to Talent resulted from bona fide employment. *See* 11 C.F.R. § 113.1(g)(6)(iii). In the affidavit signed by its Chancellor, the University submits that the fellowship granted to Talent was established to support the presence of distinguished visitors involved in the educational and scholarly programs at the University. Between January 2001 and May 2002, Talent taught three classes for the law school, business school and political science department. Two classes concerned the inner workings of Congress and the other concerned Congressional ethics. Thus, all three classes fell within Talent's areas of experience and expertise. Moreover, affidavits signed by the Deans of all three schools state that Talent's courses received favorable reviews from students and that Talent almost never missed a class, providing further indication that Talent's fellowship constituted bona fide employment rather than a sham or scheme to subsidize his campaign.

Second, no information has been presented to suggest that the compensation paid by the University was in consideration for services *other than* the services provided by Talent as part of his employment and responsibilities as a fellow. *See id.* There is no information suggesting that

1 Talent engaged in federal campaign activity on campus or that the University intended to
2 compensate Talent for something other than the classes he taught. To the contrary, the
3 University submitted an affidavit in which its Chancellor attests that he met with Talent before
4 offering the appointment and that his understanding, after discussion with Talent, was that Talent
5 would not be running for elective office before 2004, if at all.

6 Finally, the University presented evidence tending to show that the compensation paid to
7 Talent is comparable to compensation paid to similarly qualified persons for the same work over
8 the same period of time. *See id.* Arguably, as a former minority leader in the Missouri House of
9 Representatives, a four-term member of the U.S. House of Representatives, and a gubernatorial
10 candidate, Talent is a distinguished alumnus of the University with extensive experience and
11 expertise in legislative matters. Given his background and public profile, the fact that he
12 received two-thirds the salary of a full professor does not appear out-of-line. This is particularly
13 true given the examples provided by the University of similar compensation paid by the
14 University and other colleges to recruit high-profile politicians.

15
16 Thus, the information provided by the University, and the absence of evidence to the
17 contrary, strongly suggests that the University provided compensation to Talent irrespective of
18 his candidacy. Accordingly, this Office recommends that the Commission find no reason to
19 believe that Washington University violated 2 U.S.C. § 441b(a). This Office also recommends
20 that the Commission find no reason to believe that Jim Talent, Talent for Senate Committee, or
21 Garrett M. Lott, as Treasurer, violated 2 U.S.C. § 441b(a).

2. Partnership at Washington-based Law Firm

Arent Fox is a professional service limited liability company organized under the laws of the State of New York. This Office has no information concerning whether Arent Fox is registered with the Internal Revenue Service as a partnership or as a corporation⁹ or information that would suggest the law firm is publicly traded. It is, therefore, unclear whether Arent Fox is subject to the prohibition against corporate contributions or simply the contribution limits applied to partnerships. *See* 11 C.F.R. § 110.1(g). Nevertheless, it appears that Arent Fox provided compensation to Talent and Woodbury irrespective of Talent's candidacy and, therefore, did not make a contribution to the Senate campaign. *See* 11 C.F.R. § 113.1(g)(6).

First, the information provided to this Office suggests that the payments made to Talent resulted from bona fide employment. *See* 11 C.F.R. § 113.1(g)(6)(iii). Arent Fox maintains that it hired Talent with the expectation that his exceptional track record of legislative accomplishments and policy-making expertise would generate new clients. This expectation does not appear unusual for a Washington-based law firm with hopes of raising its profile and profits in the areas of lobbying and legislative matters.¹⁰ This expectation also appears to have been realized, at least in part, by Talent's recruitment of six clients who retained the firm's services on various federal matters.

⁹ The federal tax information of an LLC, as in the case of most taxpayers, is not held out to the public.

¹⁰ Indeed, an article published in *Legal Times* reported that the "revolving door" between federal government and law firms is a permanent feature of the Washington legal market and that area law firms with large lobbying practices offer substantial six to seven figure salaries to recruit top administration talent and former elected officials. *See* Vanessa Blum, *New Spin on the Revolving Door*, *Legal Times*, May 28, 2001.

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1 There is evidence tending to show that Talent and his associate, Jennifer Woodbury,
2 provided bona fide legal services to firm clients, including the lobbying disclosure statements
3 submitted by Arent Fox listing Talent and/or Woodbury as the registered lobbyists for the six
4 clients recruited by Talent. These statements are corroborated by the responses filed by all six
5 clients – HBE Corporation, Logan College of Chiropractics, the National Federation of
6 Independent Businesses, Missouri Hospital Association, Unigroup, Inc., and Midwest
7 Manufacturing Technology Corporation –which assert that Talent and Arent Fox provided legal
8 assistance on various federal issues, including litigation involving the U.S. Department of Labor,
9 the procurement of a federal grant for a learning resource center, federal bankruptcy legislation,
10 and lobbying efforts concerning the Patients' Bill of Rights, Medicare/Medicaid, and government
11 contract matters.

12 Given this information, and in the absence of evidence to the contrary, Arent Fox appears
13 to have shared a bona fide employment relationship with both Talent and Woodbury.

14 Second, there is no evidence indicating that the compensation paid by Arent Fox may
15 have been in consideration for services *other than* the services provided by Talent as part of his
16 employment. *See* 11 C.F.R. § 113.1(g)(6)(iii). The complaint presents no information indicating
17 that Talent may have engaged in federal campaign activity at the firm or that Arent Fox may have
18 hired Talent and Woodbury with the intention of supporting Talent's political career. Moreover,
19 both Talent and Arent Fox deny the same.¹¹

¹¹ It should be noted that the complaint alleges that on November 19, 2001, one day before resigning from Arent Fox, Woodbury represented Talent at a meeting held by the White House to discuss the Senate race in Missouri. Neither Talent, Woodbury nor Arent Fox address this allegation at all. No evidence has been presented indicating that Woodbury received compensation from Arent Fox for her time at this meeting. Nevertheless, it raises the

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1 Third, there is no information indicating that the compensation paid to Talent was
2 incomparable to compensation paid to similarly qualified persons for the same work over the
3 same period of time. *See* 11 C.F.R. § 113.1(g)(6)(iii). The complaint provides no information
4 concerning salaries or profits per partner at comparable Washington law firms in support of its
5 allegation that Talent's compensation was excessive or out-of-line. Arent Fox submitted an
6 affidavit signed by its managing partner in which he attests to the fact that the firm determined
7 Talent's compensation through ordinary business methods; however, the affidavit does not
8 disclose the method of computation.

9 Nevertheless, a salary does not seem out-of-line relative to the Washington
10 legal market for a high profile, part-time partner. For example, the Washington office of Verner,
11 Liipfert, Bernhard, McPherson and Hand reportedly recruited former Senator and Presidential
12 candidate Bob Dole at \$600,000 per year in 1997. *See* Marianne Levelle, *A Political Elite Joins*
13 *Lobby Shop*, Nat. L. J., August 4, 1997, at A1. Further, an article in *Legal Times* that published
14 the profits per partner reported by the twenty richest Washington law firms in 2000 reported
15 \$430,000 in profits per partner for Arent Fox that year, which suggests that the law firm reduced

question of whether Woodbury received compensation while working on the campaign at this meeting. If she was compensated, and if Arent Fox is a corporation under the Act, Arent Fox and the Senate campaign may have committed a violation of the prohibition against corporate contributions. *See* 2 U.S.C. § 441b(a). If she was compensated, and if Arent Fox is only a partnership under the Act, it is not likely that Arent Fox committed a violation of the contribution limits applicable to partnerships since the amount of compensation paid for this three-hour meeting would likely be de minimis. Under the regulations, no contribution would result if Woodbury attended the meeting on her own time or made up the time spent working on the campaign within a reasonable amount of time. *See* 11 C.F.R. § 100.7(a)(3). Given the length of the meeting, the proximity of the meeting to her departure, the absence of evidence that she did not use leave or otherwise attend the meeting on her own time, as well as the larger context of this matter, the questions raised by this single event do not alter this Office's recommendation.

1 Talent's compensation to reflect his part-time status. *See The D.C. 20: Revenues and Profits of*
2 *Washington's Top Law Firms Ranked by Profits Per Partner*, Legal Times, June 25, 2001, at 43.

3 Thus, the information available indicates that Arent Fox most likely provided
4 compensation to Talent irrespective of his candidacy. This is particularly true given the absence
5 of any evidence tending to show that Arent Fox and Talent entered into their arrangement with
6 the intent to subsidize Talent's Senate campaign or exploratory efforts. Accordingly, this Office
7 recommends that the Commission find no reason to believe that Arent Fox Kintner Plotkin and
8 Kahn, P.L.L.C., violated 2 U.S.C. §§ 441a(a) or 441b(a).¹² This Office also recommends that the
9 Commission find no reason to believe that Jim Talent, Jennifer Woodbury, Talent for Senate
10 Committee, or Garrett M. Lott, as Treasurer, violated 2 U.S.C. § 441b(a) or § 441a(a). Further,
11 since the information presented indicates that Talent, Woodbury and Arent Fox provided bona
12 fide legal services to the clients recruited by Talent, this Office recommends that the Commission
13 find no reason to believe that HBE Corporation, Logan College of Chiropractics, Inc., the
14 National Federation of Independent Businesses, Missouri Hospital Association, Midwest
15 Manufacturing Technology Corporation, or Unigroup, Inc., violated 2 U.S.C. § 441b(a).
16

¹² In its response, Arent Fox raises a procedural argument that the Commission failed to fulfill its obligation to provide notice of the complaint within five days. *See* 2 U.S.C. § 437g(a). Given our recommendation on substantive grounds, this Office will not comment further, except to state that, for reasons unknown to this Office, the envelope carrying the Commission's notice letter to Arent Fox was reportedly delivered to Arent Fox unsealed and with its contents missing. There is no indication concerning whether the envelope left the Commission unsealed or whether it became unsealed through handling by the U.S. Postal Service. Once this Office became aware of the problem, another notice letter was sent to Arent Fox.

2. *Alleged Misuse of Missouri Renewal PAC for Federal Candidacy*

There appears to be no dispute between the parties that Talent was associated with Missouri Renewal in some capacity and that Missouri Renewal was created, at least in part, to advance Republican candidates and causes in the State of Missouri. There is also no dispute that Missouri Renewal did not register with FEC and that it accepted funds that would not be permissible for a federal candidate or committee. Whether Talent misused Missouri Renewal in violation of the Act depends upon whether Talent used Missouri Renewal as a vehicle to test the waters for a possible Senate campaign or otherwise engaged in federal campaign activity with the assistance of Missouri Renewal. The information presented to this Office does not link Missouri Renewal to *any* federal campaign activity. This Office, therefore, recommends that the Commission find no reason to believe that Talent or Missouri Renewal violated the Act.

A. *Applicable Law*

The Act imposes reporting requirements, contribution limits, and source restrictions upon candidates who seek election, or nomination for election, to Federal office and upon political committees that engage in federal campaign activity.¹³ The provisions of the Act do not apply, however, to candidates who seek election to non-Federal office or to political committees that confine their activities to nonfederal campaigns. *See* 2 U.S.C. §§ 431(2), (4). In most cases, the

¹³ In order to trigger the provisions of the Act, a federal candidate must either receive contributions or make expenditures in excess of \$5,000, and a political committee must receive contributions or make expenditures in excess of \$1,000. *See* 2 U.S.C. §§ 431(2), 431(4).

1 activities of nonfederal candidates and political committees are subject instead to applicable state
2 and local law.

3 Before deciding to become a candidate for Federal office, an individual may decide to
4 "test the waters," that is, explore the feasibility of becoming a candidate. An individual who
5 merely tests the waters, and does not campaign for federal office, is not a "candidate" within the
6 meaning of the Act. *See* 11 C.F.R. §§ 100.7(b)(1)(i), 100.8(b)(1)(i). Examples of testing the
7 waters activity include, but are not limited to, the use of polls, telephone calls and travel,
8 provided they are employed solely to determine whether an individual should become a
9 candidate. *See id.*

10 Moreover, through its regulations, the Commission has exempted "testing the waters"
11 activity from the Act's contribution limits, source restrictions and reporting requirements. *See* 11
12 C.F.R. §§ 100.7(b)(1)(i), 100.8(b)(1)(i). This exemption provides that funds received or
13 payments made while an individual is testing the waters do not constitute contributions or
14 expenditures, provided, however, that the individual received or expended the funds solely for
15 the purpose of determining whether he or she should become a candidate. *See id.*

16 Importantly, the testing the waters exemption applies only during the period in which an
17 individual is determining whether to become a candidate. If the individual becomes a candidate
18 after testing the waters, the funds received and payments made during the testing the waters
19 period become contributions and expenditures subject to the requirements of the Act. *See id.*
20 Consequently, the regulations contemplate adherence with the Act's limits and prohibitions
21 during the testing the waters period in anticipation of the eventual candidacy. *See id.* If, on the
22 other hand, the individual decides not to become a candidate, the individual has no obligation to

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1 register or report as a candidate and the funds he or she raised are not subject to the Act's
2 contribution limits and source restrictions. *See id.*

3 To determine whether an individual has decided to become a candidate for federal office,
4 the Commission will look to whether the individual (1) raised funds in excess of what could
5 reasonably be expected to be used for exploratory activities or undertaking activities designed to
6 amass campaign funds that will be spent after he or she becomes a candidate, (2) employed
7 general public political advertising to publicize his or her intention to campaign for Federal
8 office, (3) made or authorized written or oral statements that refer to him or her as a candidate for
9 a particular office, (4) conducted activities in close proximity to the election or over a protracted
10 period of time, and (5) take actions necessary to qualify for the ballot. *See* 11 C.F.R.

11 § 100.7(b)(1)(ii). If the individual engages in campaign activity indicating that the individual has
12 decided to become a federal candidate, the funds received and payments made for such activity
13 must be reported as contributions or expenditures in the first report filed by the candidate's
14 principal campaign committee.

15 B. Analysis

16 1. Jim Talent, Talent for Senate Committee, and Related Respondents

17 Despite Talent's attempts to distance himself from Missouri Renewal in his response to
18 the complaint, there is information that supports the view that Missouri Renewal functioned as a
19 platform for Talent, if not to campaign, then to keep up his public profile and support Republican
20 candidates and causes until he determined his political future. Notably, Missouri Renewal
21 moved out of its office space to make way for Talent's Senate campaign immediately before
22 Talent announced his potential candidacy on August 2, 2001. Second, members of Missouri

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1 Renewal's staff resigned to work on Talent's Senate campaign, including Richard Chrismer who
2 had incorporated Missouri Renewal and later became the spokesperson for the campaign.
3 Perhaps most significant, Missouri Renewal stopped accepting contributions one month before
4 Talent's announcement and sharply decreased its expenditures after Talent established his
5 principal campaign committee.

6 The analysis, however, does not end here. The critical question of whether Talent's
7 activities through Missouri Renewal fall within the jurisdiction of the Act's source restrictions,
8 contributions limits and reporting requirements depends upon whether Talent used Missouri
9 Renewal to test the waters or engage in activity indicating that he had already decided to become
10 a candidate for Federal office. *See* 11 C.F.R. §§ 100.7(b)(1)(i), (ii). Indeed, a former member of
11 Congress who does not engage in federal campaign activity may use a state leadership PAC as a
12 political platform without triggering the Act's requirements. *See* Advisory Opinion 1986-6.

13 This Office has no information tending to show that Talent used Missouri Renewal to
14 determine whether he should become a candidate or to engage in activity indicating that he had
15 already decided to become a candidate. The complaint alleges generally that Talent used
16 Missouri Renewal to campaign for the U.S. Senate before he officially announced his potential
17 candidacy; however, it provides no specific instances of federal campaign activity conducted by
18 Missouri Renewal during this time period. The complaint refers to an expenditure made by
19 Missouri Renewal for Talent's travel to the Lincoln Day festival in early 2001, but provides no
20 information regarding whether he solicited support for a Senate run at the festival or whether he
21 held meetings with individuals or the press regarding such potential candidacy. To the contrary,
22 there was at least some indication at or about this time that Talent was awaiting decisions by

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1 other potential Senatorial candidates and had not decided whether or not to consider becoming a
2 candidate himself. *See, e.g., Branch-Brioso, supra* note 4; *Mercurio, supra* note 5; *Senate Report*
3 *'02 Missouri: Talent Could Still Show for Race*, American Political Network Hotline, March 12,
4 2001.

5 Moreover, Missouri Renewal's disclosure statements filed with the Missouri Ethics
6 Commission do not provide a clear picture of Missouri Renewal's activities. The statements
7 indicate that Missouri Renewal accepted contributions and made expenditures for fundraising
8 activities in 2001 but provide only general descriptions of Missouri Renewal's activities, none of
9 which directly link Missouri Renewal to a federal campaign.

10 In sum, this Office has no information suggesting that Talent used Missouri Renewal to
11 test the waters or engage in activity indicating that he had already decided to become a candidate
12 for Federal office. There is no allegation that Talent conducted polls with the assistance of
13 Missouri Renewal and no indication that he solicited support for a potential Senate candidacy
14 before he resigned from Missouri Renewal on July 31, 2001. *See* 11 C.F.R. §§ 100.7(b)(1)(i),
15 100.8(b)(1)(i). In addition, there is no allegation that he publicly advertised his intention to run
16 for Senate, referred to himself as a candidate, or took actions necessary to qualify for the ballot
17 before he resigned from Missouri Renewal. *See* 11 C.F.R. § 100.7(b)(1)(ii). Further, Talent's
18 association with Missouri Renewal was not in close proximity to the 2002 election and the funds
19 raised by the committee, while substantial, do not appear to have been spent by Talent's
20 campaign after he became a federal candidate. *See id.*

21 Finally, there is no information indicating that Talent used Missouri Renewal to amass
22 campaign funds or that Missouri Renewal otherwise made monetary contributions to Talent's

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1 campaign. *See id.* According to disclosure statements, there has been no commingling of funds
2 between Missouri Renewal and Talent for Senate Committee. In addition, Missouri Renewal
3 presented evidence indicating that it sold computer software to Talent's campaign at fair market
4 value and never shared office space with either Talent for Governor Committee or Talent for
5 Senate Exploratory Committee.

6 The heart of the complaint's claim appears to concern the association between Talent and
7 Missouri Renewal and public conjecture concerning Talent's potential candidacy for Senate after
8 he lost the race for governor. This Office believes that a finding of reason to believe based upon
9 this information, without something tending to show a nexus between Missouri Renewal and
10 federal campaign activity, would constitute mere speculation and conjecture. *See* MUR 4960
11 (Hillary Clinton for U.S. Senate Exploratory Committee) (purely speculative charges do not form
12 an adequate basis to find reason to believe that a violation of the Act has occurred).

13 Accordingly, this Office recommends that the Commission find no reason to believe that
14 Jim Talent, Talent for Senate Committee, Richard Chrismer, or Garrett M. Lott, as Treasurer,
15 violated 2 U.S.C. §§ 434, 441a(a) or 441b(a).¹⁴

16 **2. Missouri Renewal**

17 In the absence of information linking Missouri Renewal to federal campaign activity, this
18 Office recommends that the Commission find no reason to believe that Missouri Renewal

¹⁴ In making this recommendation, this Office does not rely upon MUR 4358, which was cited by Talent as a matter dismissed by the Commission concerning facts similar to those presented here. The Commission closed the file on MUR 4358 because the matter was identified as either stale or otherwise of low priority. MUR 4358 was not dismissed on the merits and, therefore, has no precedential value.

1 Political Action Committee or John McKenzie, as Treasurer, violated 2 U.S.C. §§ 434, 441a(a)
2 or 441b(a).

3 **3. Missouri Republican State Committee**

4 There is no dispute that the Missouri Republican State Committee–Federal Committee
5 donated \$40,000 to Missouri Renewal in January 2001. Since there is no information linking
6 Missouri Renewal to a federal campaign, however, this Office recommends that the Commission
7 find no reason to believe the Missouri Republican State Committee–Federal Committee or
8 Harvey M. Tettlebaum, as Treasurer, made an excessive or prohibited contribution in violation of
9 2 U.S.C. § 441a(a).

10 **4. Corporate Contributors to Missouri Renewal**

11 The responses filed by the corporations that donated funds to Missouri Renewal state that
12 there was no indication that the funds would be used for federal campaign activity. Many of the
13 responses use identical boiler-plate language which states that the corporations understood that
14 the funds would be used for the purposes stated in a written solicitation from Missouri Renewal,
15 namely (1) supporting candidates for state and local office, (2) developing grass roots activities
16 in Missouri, (3) eliminating voter fraud in St. Louis and Kansas City, and (4) supporting
17 community renewal in Missouri's urban areas.¹⁵

¹⁵ The response filed by counsel for GFI Digital, Inc. ("GFI"), unequivocally denies that GFI engaged in "improper activity." In support thereof, counsel references an attachment to the Complaint that lists the contributors to Missouri Renewal but then states that GFI made a lawful campaign contribution of \$250.00 to Mr. Talent's campaign. Given counsel's sharp and unequivocal denial of wrongdoing on the part of GFI in his letter, this Office concludes that counsel likely intended to state that the contribution was for Missouri Renewal, not Talent for Senate Committee, and instead made a sloppy mischaracterization of the attachment.

Given these responses, and in the absence of information linking Missouri Renewal to federal campaign activity, this Office recommends that the Commission find no reason to believe that Interlift Inc., May Department Stores International, Inc., Sioux City Truck and Trailer, Inc., Shaughnessy-Kniep-Hawe Paper Company, Bryan Printing Company, Sandhill Quilting Co., Inc., Western Press, Inc., Fry Investment Company, A.J. Brown, Inc., Abilheira & Ferrare, P.C., A-Mrazek Moving Systems, Inc., Tubular Steel Industries, Inc., TMP Worldwide, Inc., Hunter Engineering Company, Shilli Corporation, or GFI Digital, Inc., violated 2 U.S.C. § 441b(a).

5. Individual Contributors to Missouri Renewal

There appears to be no dispute that Missouri Renewal received \$20,000 from respondent Gary Schell and \$1,000 from respondent Robert Human. In their responses, these individual respondents state that they understood, at the time of their donations, that the funds would be used solely for the purposes stated in the written solicitation from Missouri Renewal. Since no information has been presented linking Missouri Renewal to a federal campaign, this Office believes that any violation arising out of these individual contributions is a question of state law and within the exclusive jurisdiction of the Missouri Ethics Commission.

Further, according to disclosure reports filed with the Commission, Robert Human made contributions to Talent for Senate Committee in the amounts of \$1,000 for the Primary Election and \$1,000 for the General Election. Since these amounts reflect the maximum amounts permitted from individual contributors under FECA, there appears to be no violation of the Act on this ground. *See* 2 U.S.C. § 441a.

Accordingly, this Office recommends that the Commission find no reason to believe Gary Schell and Robert Human made excessive contributions in violation of 2 U.S.C. § 441a(a).

III. RECOMMENDATIONS

1. Find no reason to believe that Washington University violated 2 U.S.C. § 441b(a).
2. Find no reason to believe that Jim Talent, Talent for Senate Committee, or Garrett M. Lott, as Treasurer, violated 2 U.S.C. §§ 434, 441a(a) or 441b(a).
3. Find no reason to believe that Arent Fox Kintner Plotkin and Kahn, P.L.L.C., violated 2 U.S.C. §§ 441a(a) or 441b(a).
4. Find no reason to believe that Jennifer Woodbury violated 2 U.S.C. §§ 441a(a) or 441b(a).
5. Find no reason to believe that HBE Corporation, Logan College of Chiropractics, Inc., the National Federation of Independent Businesses, Missouri Hospital Association, Midwest Manufacturing Technology Corporation, or Unigroup, Inc., violated 2 U.S.C. § 441b(a).
6. Find no reason to believe that Richard Chrismer violated 2 U.S.C. §§ 434, 441a(a) or 441b(a).
7. Find no reason to believe that Missouri Renewal Political Action Committee or John McKenzie, as Treasurer, violated 2 U.S.C. §§ 434, 441a(a) or 441b(a).
8. Find no reason to believe that Missouri Republican State Committee—Federal Committee or Harvey M. Tettlebaum, as Treasurer, violated 2 U.S.C. § 441a(a).
9. Find no reason to believe that Interlift Inc., May Department Stores International, Inc., Sioux City Truck and Trailer, Inc., Shaughnessy-Kniep-Hawe Paper Company, Bryan Printing Company, Sandhill Quilting Co., Inc., Western Press, Inc., Fry Investment Company, A.J. Brown, Inc., Abilheira & Ferrare, P.C., A-Mrazek Moving Systems, Inc., Tubular Steel Industries, Inc., TMP Worldwide, Inc., Hunter Engineering Company, Shilli Corporation, or GFI Digital, Inc., violated 2 U.S.C. § 441b(a).
10. Find no reason to believe that Gary Schell or Robert Human violated 2 U.S.C. § 441a(a).
11. Approve the appropriate letters.
12. Close the file.

Lawrence H. Norton
General Counsel

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5 12/19/22
6 Date

BY:

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